BRIEF FOR INTERVENORS MIDWEST TELEVISION, INC. (KFMB-TV), JACK O. GROSS (KJOG(TV)), AND SAN DIEGO TELECASTERS, INC. (KAAR)

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Case No. 21,183

SOUTHWESTERN CABLE CO., *Petitioner,*

v.

UNITED STATES OF AMERICA

and

FEDERAL COMMUNICATIONS COMMISSION, *Respondents.*

Case No. 21,192

MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO., and TRANS-VIDEO CORP., *Petitioners,*

v.

UNITED STATES OF AMERICA

and

FEDERAL COMMUNICATIONS COMMISSION, *Respondents.*

ON PETITIONS FOR REVIEW OF MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

ERNEST W. JENNES
CHARLES A. MILLER
JOHN E. VANDERSTAR

Covington & Burling
701 Union Trust Building
Washington, D. C. 20005

Attorneys for Intervenors
Midwest Television, Inc. (KFMB-TV),
Jack O. Gross (KJOG (TV)), and
San Diego Telecasters, Inc. (KAAR)

Of Counsel:

MILLER & SPIEGELMAN
986 Mills Building
220 Montgomery Street
San Francisco, California
94104

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JURISDICTIONAL STATEMENT

These cases were brought by two petitions for review of a Memorandum Opinion and Order (FCC 66-6837) released July 25, 1966,[1] by respondent Federal Commu-

[1] Corrected by an Erratum released July 26, 1966.

nications Commission (hereinafter "FCC" or "Commission") in a proceeding before the Commission, *In the Matter of Midwest Television, Inc. (KFMB-TV)*, Docket No. 16786. Petitioners in this Court are some of the respondents in the proceeding before the Commission. Petitioners invoke this Court's jurisdiction under Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a), and the Judicial Review Act of 1950, as amended, 5 U.S.C. §§ 1031-42. By order of the Court dated August 23, 1966, the two cases were consolidated for all purposes.

This brief is submitted jointly by Midwest Television, Inc. ("Midwest"), San Diego Telecasters, Inc. ("Telecasters"), and Jack O. Gross ("Gross"). By an order dated August 23, 1966, the Court granted the motions of Midwest, Telecasters, and Gross for leave to intervene in this proceeding. Intervenors support the position of respondents.

COUNTER STATEMENT OF THE CASE

Petitioners own and operate a number of CATV systems in and around San Diego, California. Southwestern Cable Co. ("Southwestern"), petitioner in No. 21,183, owns a CATV system operating in a section of San Diego. Petitioners in No. 21,192 are related companies. Mission Cable TV, Inc., operates several CATV systems in the San Diego area and holds franchises to operate other CATV systems. Pacific Video Cable Co. ("Pacific") owns CATV systems operating in and around El Cajon, California, a city very near San Diego. Trans-Video Corp. ("Trans-Video") is majority owner of Mission Cable TV, Inc., and sole owner of Pacific. It also operates the CATV systems owned by its subsidiaries and by Southwestern. Peti-

tioners in No. 21,192 will generally be referred to collectively as "Mission."

Intervenors Midwest and Telecasters operate television stations in San Diego: respectively, KFMB-TV, Channel 8, a CBS affiliate, and KAAR, Channel 39, a UHF station not affiliated with a national television network. Intervenor Gross holds a permit from the FCC to construct another UHF television station, KJOG(TV), on Channel 51 in San Diego; it would also be unaffiliated. The San Diego area also receives off-the-air television service from three other stations, KOGO-TV, Channel 10, affiliated with NBC, XETV, Channel 6, an English-language ABC affiliate which operates in Tijuana, Mexico, just across the border from San Diego, and XEWT, Channel 12, a Spanish-language station in Tijuana. Finally, an application is pending at the FCC for authorization to construct a non-commercial educational television station on Channel 15 in San Diego, and the Commission is considering assignment of an additional UHF commercial channel to San Diego. (R. 579)

Thus, the San Diego area now receives, off the air, the signals of five local or area television stations, one of them broadcasting in Spanish; it should soon receive two more local signals off the air, one of them educational, and it might have an eighth channel allocated to the area by the FCC. Only three other California television markets—Los Angeles, San Francisco and Sacramento-Stockton—and very few other markets throughout the United States have more allocated channels than San Diego now has.[2] There are approximately 470,000 television households in the San Diego market, as compared with well over 3 million in the Los

[2] See 47 C.F.R. § 73.606(b).

Angeles market, well over 1½ million in the San Francisco market, and nearly 900,000 in the Sacramento-Stockton market.[3]

Petitioners' CATV systems carry the signals of most or all of the seven VHF stations operating in Los Angeles. They also carry the signals of the four English-language stations operating in the San Diego area. This means that among residents of the San Diego area who are not CATV subscribers there are essentially four television stations seeking viewership. Among CATV subscribers, viewership is dissipated among up to eleven stations.

Midwest initiated the proceeding before the Commission by filing a petition, pursuant to the Commission's CATV rules,[4] which in substance requested the Commission to limit, *pendente lite* and then permanently after hearings, any further expansion by petitioners' CATV systems insofar as they carry Los Angeles signals. Pursuant to the rules the allegations in the petition were supported by affidavits. (R. 1-56, 121-44) Intervenor Gross promptly filed in full support of the petition (R. 186-91) and intervenor Telecasters, by a letter submitted with a later Midwest pleading (R. 506-17), also expressed its support. Intervenor Gross was made a party to the proceeding (R. 594), and intervenor Telecasters moved to be made a party after the record was certified to the Court.

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[3] Television household data taken from Television Factbook No. 36, published by Television Digest, Inc., Washington, D. C., 1966, pp. 38-a, 39-a.

[4] 47 C.F.R. §§ 74.1101-09. The Counterstatement of Facts contained in the brief of respondents adequately describes these rules and the events leading to their adoption.

The petition, affidavits, and other filings showed that if the CATV systems were allowed to continue to expand, the San Diego area would be flooded with Los Angeles signals, thus severely fragmenting the audience of the San Diego stations, both present and proposed. It was shown further that since a television station's revenues are directly related to its audience the revenues of the San Diego stations would be impaired by this audience fragmentation. The result, it was shown, would be an impairment of the ability of the existing stations to operate in the public interest and of the ability of the unborn stations to come on the air and develop effective programming. This result would be detrimental to the public interest, it was shown, because those who did not or could not subscribe to CATV would receive no compensation for a loss of existing or potential television service, and those who were subscribers would lose existing and potential locally originated programming with little real program variety received in exchange.

After study of Midwest's petition and supporting affidavits, and after reviewing voluminous additional pleadings and data submitted by all the parties (R. 121-44, 186-91, 194-263, 265-328, 330-62, 377-84, 388-400, 404-500, 506-57), the Commission issued the Memorandum Opinion and Order being reviewed here. (R. 577-98) The Commission concluded that "Midwest has presented a classic case for a hearing with respect to the general issues of expansion of respondents' [petitioners here] CATV systems throughout the San Diego market area." (R. 587) Accordingly, it designated the matter for evidentiary hearing. The Commission also said:

> "Further, unless this expansion is appropriately limited pending resolution of the issues, within a

> very short period of time the systems could wire up thousands of new subscribers. We have made clear in the Second Report the impracticability of withdrawing service, once established, because of its disruptive effect. We have also made clear the strong public interest considerations which should be resolved before the establishment or entrenchment of CATV substantially throughout an area such as San Diego is permitted. Accordingly, interim relief appropriately limiting further expansion until resolution of the public interest issues is called for." (R. 588)

The interim order the Commission entered did not require petitioners to disconnect a single subscriber. Instead, the order required that pending completion of the Commission proceedings petitioners are not to add new subscribers, with two exceptions. New lines may be built and new subscribers added in any area (as indicated on certain maps) in which any of petitioners' CATV systems was operating on February 15, 1966 (the effective "grandfather" date for CATV systems that were operating when the Commission's CATV rules were issued). Also, new lines may be built and new subscribers added in any other area so long as only San Diego area stations are carried. (R. 592-94)

Petitioners then brought the Commission's interim order here for review. They also sought a stay of the order pending disposition by the Court of these proceedings. By order dated August 23, 1966, the Court stayed the Commission's order pending disposition of these proceedings insofar as it would preclude petitioners from adding new subscribers to their trunk and feeder lines in existence on the date of the order. Thus, the only restraint under which petitioners now operate

is that new trunk and feeder lines may not be built to carry Los Angeles signals in areas where petitioners' CATV systems were not operating on February 15, 1966.

SUMMARY OF ARGUMENT

1. The Commission has the power to issue the interim order being reviewed here, and no rights of petitioners were violated. The order is an interim order designed to prevent a major departure from the status quo while the Commission proceeding goes forward. The order was not issued under Section 312 of the Communications Act, and the Commission was not required to follow the procedures set forth in that section. However, the procedures that were followed were fair. Petitioners were on notice of the issues. They exercised the opportunity to respond. In short, they have been heard.

The Commission's power to issue the order derives from Section 4(i) of the Communications Act, which grants the Commission authority to make such rules and issue such orders, not inconsistent with the Act, as may be necessary in the execution of the Commission's function of regulating the communications industry in the public interest. Prior court of appeals decisions construing almost identical language in the Natural Gas Act, and another decision upholding the power of the SEC to issue an interim order in analogous circumstances, show that Section 4(i) gives the Commission the power to issue the order being reviewed. The two cases petitioners rely on are plainly distinguishable and do not suggest a different result.

2. The Commission's findings support the interim order. They show that the essential criterion—the public interest—has been satisfied, and the administrative

agency's judgment on this public interest question is entitled to great weight.

In adopting the underlying CATV rules, the Commission found that CATV systems carrying distant signals posed a threat to the viability of existing and potential television broadcast service, particularly UHF, with consequent harm to the public interest. It devised a regulatory program designed to permit examination of this problem in advance, generally in an evidentiary hearing, before CATV systems became entrenched, in view of the difficulty of attempting to "roll back" the situation at the conclusion of a hearing. It accordingly established procedures under which, upon a proper showing, it could issue interim orders to preserve the status quo while the hearing proceeded.

After reviewing the pleadings, affidavits, and other documents filed in the proceeding below the Commission concluded that they presented "a classic case for a hearing" on the public interest questions involved in carrying Los Angeles signals on CATV systems in the San Diego area. It also found that expansion of petitioners' CATV systems while the proceeding was underway, which could well occur if permitted, could frustrate the Commission's attempt to resolve the public interest questions. These findings and conclusions adequately support the issuance of the interim order under review, the Commission not being required to find further that intervenor Midwest would be irreparably injured if the interim order were not entered.

3. Petitioners' CATV systems are subject to the regulatory authority of the FCC under the Communications Act. CATV is interstate communication by wire or radio, to which the Act applies. The Commission's statutory powers with respect to television provide the

basis for regulating CATV to ensure that CATV communications operations are consistent with, and not harmful to, the television allocations plan which the Commission has established and the Congress has supported. The Commission's authority is not confined to regulation of communications common carriers and licensing of radio stations. It may regulate an entity within its statutory jurisdiction, which includes CATV systems, to promote the overall objectives of the Communications Act. Unregulated CATV can frustrate those objectives and the Commission is not powerless to prevent that result. Finally, CATV systems are not mere "master antennas" and cannot avoid being regulated on that ground.

4. Neither the order under review nor the CATV rules violate the First Amendment. CATV systems are subject to FCC regulation designed to avoid frustration of the national goal of local and area television broadcast service. Television stations are likewise subject to FCC regulation to promote the same goal and are subject to the placing of limits on their ability, whether directly or indirectly, to extend their signals beyond specified areas. Such regulation does not violate the First Amendment, and CATV systems can claim no greater constitutional rights than the stations whose signals they carry. The Commission is not regulating program content in either case. Moreover, regulation of communications systems, when it does not regulate program content, does not depend for its constitutional validity upon the scarcity of radio frequencies; several types of such regulation are valid and have nothing to do with radio frequencies. Finally, the decision in *Weaver* v. *Jordan* is not applicable.

5. Lastly, the adoption of Section 74.1109 of the CATV rules did not violate the notice requirement of

the Administrative Procedure Act. The argument petitioners make on this point was not raised before the Commission and should be rejected by the Court. Also, the notice of proposed rule making put petitioners on notice that their carrying of Los Angeles signals in the San Diego area might be limited by Commission rules. Moreover, petitioners did have notice of a proposal very much like Section 74.1109 through comments filed in the rule making proceeding.

ARGUMENT

I. THE COMMISSION HAS THE POWER TO ISSUE THE INTERIM ORDER BEING REVIEWED HERE, AND NO RIGHTS OF PETITIONERS WERE VIOLATED.

Initially, it should be pointed out that the Commission could have adopted the request of various parties in the CATV rule making proceeding and issued a general rule freezing CATV expansion completely. Alternatively, it could have frozen CATV expansion by general regulations or policies which made provision for new or expanded CATV operations only in carefully defined and limited situations. The rules and policies which the Commission did adopt and which are challenged here do not go that far, and CATV has been given many more rights and far more opportunity than was required. The Commission established a scheme of CATV regulation which is implemented by a series of individual determinations, with the burden in some instances on the broadcaster and in some instances on the CATV operator to initiate action at the Commission to vindicate the public interest. Vital to this approach are those provisions of the Commission's rules which permit it to take interim action while it is deciding whether to proceed or while a proceeding is pending before it. Since the Commission could have

established a system of regulation far more rigid, far more inflexible and far more restrictive, insofar as petitioners are concerned, it is important to consider petitioner's arguments with respect to the Commission's interim order in this context. It would be ironic indeed if a system of regulation which is less restrictive were to fail when, as will be shown below, the Commission's authority to regulate CATV is clear and when a broad system of prohibitory rules would have affected the petitioners more sharply and more directly than the interim order being reviewed.

A. Section 312 of the Communications Act Is Not Applicable to the Issuance of the Order Under Review.

Petitioners first argue that the Commission's interim order is illegal because the Commission did not comply with Section 312(b)-(e) of the Communications Act, 47 U.S.C. § 312(b)-(e).[5] The argument misconceives the basis and function of the Commission's order.

Section 312(b) authorizes the Commission to order a person to cease and desist from failing to operate substantially as set forth in his license or from violating statutory or regulatory provisions. Sections 312(c)-(e) prescribe, either explicitly or by reference to the Administrative Procedure Act, the procedures to be followed in proceedings for the issuance of cease and desist order.

The order under review is not a cease and desist order issued under Section 312. The proceeding

[5] The argument on the Commission's power to issue the interim order is set out in the brief of Southwestern, petitioner in No. 21,183, and is incorporated by reference in the Mission brief. The other arguments are set out in the latter brief and incorporated by reference in the brief of Southwestern.

in which the order was entered was not an enforcement proceeding. The Commission did not base the order on a finding that petitioners were in violation of any statute, rule, or regulation.[6] The procedures followed by the Commission did not derive from Section 312, and the Commission did not purport to act under that section.[7]

Therefore, the Commission was not required to follow the procedures of Section 312 in issuing the interim order. The order was grounded on Section 4(i) of the Communications Act, 47 U.S.C. § 154(i). It is either a proper order under Section 4(i) or it is not. As will be seen below, Section 4(i) authorizes the Commission to issue such orders as may be neces-

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[6] Since issuing the CATV rules the Commission has proceeded against several CATV systems for operating in violation of the rules. Unlike the case here, those proceedings were cease and desist proceedings within the meaning of Section 312 and were treated as such. *E.g.*, Jackson TV Cable Co., Docket No. 16711, 4 F.C.C.2d 979 (1966); TeleSystems Corp., Docket No. 16666, 4 F.C.C.2d 628 (1966); Booth American Co., Docket No. 16635, 4 F.C.C.2d 509 (1966); Mission Cable TV, Inc., *et al.*, Docket No. 16575, 4 F.C.C.2d 236 (1966); Buckeye Cablevision, Inc., Docket No. 16551, 3 F.C.C.2d 798 (1966).

[7] If the order under review had been issued under Section 312, petitioners would be in the wrong forum. Jurisdiction to review such orders is vested exclusively in the United States Court of Appeals for the District of Columbia Circuit. Communications Act, Sec. 402(b)(7), 47 U.S.C. § 402(b)(7). Some of the cease and desist proceedings referred to in note 6, *supra*, have been appealed, all to the United States Court of Appeals for the District of Columbia Circuit. Jackson TV Cable Co. v. FCC, No. 20468; TeleSystems Corp. v. FCC, No. 20387; Booth American Co. v. FCC, No. 20367; Buckeye Cablevision, Inc. v. FCC, No. 20274. The petitions to review which instituted the instant proceedings were filed under Section 402(a) of the Act, 47 U.S.C. § 402(a), which governs review of FCC orders other than those appealable under Section 402(b).

sary in the execution of its functions. If Section 4(i) does not authorize the interim order of the Commission, that is the end of the case. If it does authorize the order, the Section 312 argument of petitioners is quite irrelevant.

Moreover, the Commission's temporary order is intended to prevent a major departure from the status quo and intended to do this not only as a matter of form but as a matter of substance. Petitioners were not required to stop carrying any signals they are carrying to any subscriber. They were not required to withdraw service from any subscriber. In fact, they were not in general prohibited from installing new service to new subscribers in the areas in which they were already operating. All that the interim order did was to restrict the *extent* of petitioner's expansion until the conclusion of the proceeding pending before the Commission.

Since the order was not issued under Section 312 the Commission was under no obligation to adhere to the procedures therein established. But the Court should note that the Commission in fact afforded petitioners extensive procedural protection. Petitioners were served with and were therefore fully aware of the allegations of Midwest's petition and the facts in the supporting affidavits. Their voluminous responsive pleadings, with many supporting affidavits, attest to the opportunity given them to be heard on Midwest's allegations. It is true that there was no *oral* hearing. Even if the order being reviewed were a final order this lack would not necessarily be fatal.[8] But the

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[8] See FCC v. WJR, 337 U.S. 265 (1949); American Broadcasting Co. v. FCC, 179 F.2d 437, 442 (D.C. Cir. 1949).

order is not final. It does not purport to settle the rights of the parties. It is an interim order. It is designed to preserve, to an extent, the existing situation during the pending proceedings because the Commission concluded that unlimited expansion by petitioners while the proceedings are pending could result in "consequences possibly adverse to the public . . . ."

Petitioners have received fair treatment. They have been heard in all matters they wished to bring to the Commission's attention. Their claims of violation of their "statutory rights" should be rejected.

B. Authority To Issue the Order Under Review Derives From Section 4(i) of the Communications Act.

Petitioners also assert that apart from Section 312 the Commission is without power to issue interim orders like the order under review. In view of the broad grant of power in Section 4(i) of the Act and the relevant case law, this argument must also fail.

In Section 4(i) the Commission is authorized to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." This grant of power is broad enough to authorize the order under review, and it was just such broad power that Congress intended to confer. The "dominant characteristic" of the communications industry is "the rapid pace of its unfolding," and in view of this fact the powers given to the Commission are "not niggardly but expansive . . . ." *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 219 (1943). The Commission was established "to maintain . . . a grip on the dynamic aspects of radio transmission," and in "recognition of the rapidly fluctuat-

ing factors characteristic of the evolution of broadcasting" there is a "corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

In light of this basic philosophy of the Communications Act, as enunciated by the Supreme Court, it is not possible to read the broad language of Section 4(i) out of the statute, as petitioners seek to do. The Commission may "perform any and all acts," it may "make such rules and regulations, and issue such orders"—so long as not inconsistent with the Act—"as may be necessary in the execution of its functions." This is an unusual grant of administrative authority, which few other agencies have. One wonders how Congress could more clearly have authorized its agent in the communications field to do the things it had to do to get the job done, irrespective of the enumeration elsewhere in the act of other powers Congress wanted the Commission to have and exercise. The power to direct a person within the Commission's jurisdiction not to take specified action which would, in view of the Commission's findings, be contrary to the public interest and could frustrate the results of a lengthy hearing is necessary to the execution of the Commission's functions.

C. Cases Involving the Powers of Other Administrative Agencies Show That Section 4(i) Grants the Commission the Authority To Issue the Order Under Review.

Two cases upholding the authority of the Federal Power Commission to issue interim orders under almost identical statutory authorization are very much in point. *Amerada Petroleum Corp.* v. *FPC*, 293 F.2d 572 (10th Cir. 1961), *cert. denied*, 368 U.S. 976 (1962);

Public Serv. Comm'n v. *FPC,* 327 F.2d 893 (D.C. Cir. 1964).

In *Amerada* the FPC had refused to permit a gas producer to file a new rate schedule while a previously filed schedule was still under investigation. No provision of the Natural Gas Act authorized the Commission's action. The court of appeals upheld the action, largely because

> "by section 16 of the Act, the Commission is expressly vested with power 'to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders * * * as it may find necessary or appropriate to carry out the provisions of this Act.' Manifestly, that is a sweeping grant of administrative authority to be exercised in the sound discretion of the Commission . . . . Considering the statute and the regulations together, we entertain no doubt that the Commission was clothed with authority to enter the order . . . ." 293 F.2d at 575.[9]

In *Public Service Comm'n* the FPC issued temporary certificates of convenience and necessity pursuant to a regulation which was claimed to be invalid. The court of appeals upheld the regulation:

> ". . . the problems placed under Commission administration, with consequent Commission respon-

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[9] The decision in Willmut Gas & Oil Co. v. FPC, 294 F.2d 245 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 975 (1962), is not in conflict with *Amerada*. In *Willmut* the court upheld the FPC's *refusal* to reject a new rate schedule under different circumstances. Neither opinion cited the other, the cases having been decided only four days apart, and despite a claimed conflict between the circuits the Supreme Court denied certiorari in the two cases on the same day. Moreover, the District of Columbia Circuit in a later case upheld the FPC's *exercise* of power under Section 16 in a different context. Public Serv. Comm'n v. FPC, 327 F.2d 893 (D.C. Cir. 1964), discussed in the text, *infra*.

> sibilities, call upon the courts to give the Act a scope reasonably necessary to permit the agency to perform its tasks consistently with the provisions and purposes of the legislation. The broad grant of implementing authority conferred by Section 16 is not confined to procedural regulations and we think easily encompasses Regulation § 157.28(*c*) . . . .
>
> "All authority of the Commission need not be found in explicit language. Section 16 demonstrates a realization by Congress that the Commission would be confronted with unforeseen problems of administration in regulating this huge industry and should have a basis for coping with such confrontation. While the action of the Commission must conform with the terms, policies and purposes of the Act, it may use means which are not in all respects spelled out in detail. See American Trucking Ass'ns v. United States, 344 U.S. 298, 73 S. Ct. 307, 97 L. Ed. 337 (1953); National Broadcasting Co. v. United States, 319 U.S. 190, 217-221, 63 S. Ct. 997, 87 L. Ed. 1344 (1943)." 327 F.2d at 896-97.[10]

Section 16 of the Natural Gas Act, 15 U.S.C. § 717*o*, bears a striking resemblance to Section 4(i) of the

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[10] The fact that in the *Public Serv. Comm'n* case the Commission used its Section 16 authority to grant rather than deny or limit a right to engage in activity subject to regulation does not diminish the value of the decision as a precedent here. A grant that is not authorized by the agency's enabling statute is just as illegal as an unauthorized denial or limitation. Moreover, neither the grant of a temporary certificate to sell natural gas nor the placing of a temporary limitation upon further expansion by a CATV system can be viewed as a matter of adjusting conflicting private rights. The Public Service Commission in the natural gas case had standing because it claimed it was aggrieved as a customer of the gas producers' purchaser; Midwest Television has standing here because it is aggrieved by CATV's fragmentation of its audience. In both cases, however, the public interest is the touchstone of the Commission's authority.

Communications Act, not only in its language but also in its placement in the statute. Other subsections of Section 4 deal with a variety of housekeeping functions of the FCC, and petitioners argue that the broad language of Section 4(i) should be read to authorize the performance only of other housekeeping functions not elsewhere specified. But Section 16 of the Natural Gas Act also deals with a number of housekeeping functions. Yet it is obvious from the cases discussed above that section 16's grant of authority is not limited to housekeeping functions and in fact "is not confined to procedural regulations," 327 F.2d at 896, but instead extends to the most basic substantive responsibilities of the FPC, rate making and issuance of certificates of public convenience and necessity.

The SEC also has the power, despite the lack of explicit statutory language dealing with the question, to issue interim orders both against issues of securities and against registered broker-dealers. Under Section 3(b) of the Securities Act of 1933, 15 U.S.C. § 77*c*(b), the Commission by regulations exempts from the act's full registration requirements smaller public offering of securities. Acting under these regulations the Commission temporarily suspended the exemption of an issue of stock and ordered a hearing to determine whether the suspension should be made permanent. This temporary suspension automatically disqualified the broker-dealer who had underwritten the stock from engaging in the distribution of *any* securities under the exemption regulations pending completion of the hearing. The court of appeals upheld the automatic suspension against the broker-dealer's claim that it deprived him of a substantial going business without notice or hearing. *R. A. Holman & Co.* v. *SEC*, 299

F.2d 127 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962). The court noted that the broker-dealer was making two assumptions:

> "The first assumption is that a hearing is required prior to the taking of agency action of the present sort. The second is that the mere bringing of charges cannot lawfully result in any serious consequence to the person charged."

The court then said:

> "Neither of these closely-related assumptions is tenable in the present context. In a wide variety of situations, it has long been recognized that where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing." 299 F.2d at 131.

"Cases of this sort," said the court, "involve a balancing of competing interests." On the one hand the securities-purchasing public must be protected; on the other is the interest of the broker-dealer in continuing to underwrite issues of securities under the simplified procedures of the exemption regulations. Authority to strike this balance against the broker-dealer, even without giving him notice or any kind of hearing, is within the "broad rule-making powers" Congress has given the SEC. *Cf. Gilbertville Trucking Co.* v. *United States,* 371 U.S. 115 (1962); *FTC* v. *Mandel Bros.,* 359 U.S. 385 (1959).

Here the public interest to be served by the FCC's interim order is not protection against fraud in the sale of securities. But neither is the effect of the order to require petitioners to discontinue an important segment of their present business activity, for

the Commission's order deals only with further expansions and not with existing service. And an important public interest is served by the order—the interest of the entire public in the fullest possible television service. Moreover, here there was notice and an opportunity, exercised in full, to submit a written presentation; neither privilege was given the broker-dealer in *Holman*.

D. Neither of the Cases Petitioners Cite Suggests a Different Conclusion.

To support their contention that the Commission lacked power to issue the interim order under review petitioners rely upon what they call "consistently established judicial precedents." Only two cases are cited, however. Neither is apposite.

In the first case, *Standard Airlines, Inc.* v. *CAB*, 177 F.2d 18 (D.C. Cir. 1949), the appellant had been totally deprived of its ability to do business. That is not the effect of the interim order in this case. Moreover, the court there treated the appellant as one who had been given an "operating permit," *i.e.*, a franchise, by the CAB, which had then summarily suspended the franchise. Furthermore, the underlying reasoning of the decision has been rejected by the Supreme Court, and the same court of appeals has more recently so narrowly limited it as to make clear that it has no applicability here.

The issue in *Standard Airlines* was the kind of "hearing" the CAB had to hold before it could suspend a letter of registration pending proceedings looking to permanent revocation. Without the registration, which the court viewed as a franchise issued by

the CAB, the appellant could not legally operate. The Board, upon a show-cause order accompanied by a motion of an enforcement attorney, and the carrier's answer, issued the suspension order without further proceedings. The court of appeals set the order aside. It remanded the case for "a hearing of such nature and extent as will permit the carrier to present *orally* its reasons why its registration should not be suspended pending the revocation proceedings." 177 F.2d at 21. (Emphasis added.)

Whatever the validity of the *Standard Airlines* doctrine in a case where "property is being taken or destroyed," 177 F.2d at 20—the carrier there could not legally operate while its franchise from the CAB was suspended—the doctrine has no applicability where, as here, the interlocutory order does not suspend the company's operations but merely places limits on the degree of further expansion while the proceeding is in progress.

In any event, the value of the case as a precedent has been seriously weakened by later decisions.[11] The

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[11] The case also was sharply criticized by Professor Davis:

"The court seemed unaware of the fact that a typical temporary restraining order issued by a court takes or destroys property in the same sense but that no previous hearing is required. The question is not one of 'the rudiments of fair play' but is one of making the right temporary adjustment pending hearing. The Board found, rightly or wrongly, that the registration should be suspended until a hearing could be conducted on the question of revocation. The court should not have set aside that determination without inquiring into the reasons which impelled the Board to take immediate action in advance of hearing." 1 Davis, Administrative Law § 7.08, at 440 (1958).

court, in discussing its central holding that an oral hearing was required, referred to "two recent cases" it had decided, *L. B. Wilson, Inc.* v. *FCC*, 170 F.2d 793 (D.C. Cir. 1948), and *WJR* v. *FCC*, 174 F.2d 226 (D.C. Cir. 1948). Soon after the *Standard Airlines* decision, *WJR* was reversed by the United States Supreme Court. 337 U.S. 265 (1949). The Court held that oral argument is not a necessary element of "administrative due process." And the order involved in *WJR* disposed of the proceeding entirely, insofar as the complaining party was concerned. Clearly, oral argument may be dispensed with where the order is interlocutory, as the order under review is. Shortly, after the Supreme Court decision in *WJR*, which involved "pure" questions of law, the same court of appeals decided a case which, like *L. B. Wilson*, involved "mixed questions of fact and law." The court held that in view of *WJR* no oral hearing was required in that type of case. *American Broadcasting Co.* v. *FCC*, 179 F.2d 437, 442 (D.C. Cir. 1949).[12] Thus, *L. B. Wilson* no longer supports the *Standard Airlines* decision either.

Finally, any reliance on *Standard Airlines* must reckon with the more recent decision by the same court in the *Holman* case, discussed above. There the court squarely repudiated the notion that "a hearing is required prior to the taking of agency action" which severely limits a person's business activity and that "the mere bringing of charges cannot lawfully result in any serious consequences to the person charged."

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[12] Although *L. B. Wilson* was not cited in the *ABC* case, the same judge wrote the opinions of the court of appeals in all three cases—*L. B. Wilson*, *WJR*, and *ABC*.

299 F.2d at 131.[13] The broker-dealer in *Holman* was not put entirely out of business, while the air carrier in *Standard Airlines* could not operate while the "operating permit" it had received from the CAB was suspended by the CAB. That distinction alone could justify some difference in the procedural rights accorded, and the court in *Holman* distinguished *Standard Airlines* on just that ground. 299 F.2d at 132 n. 9. *Standard Airlines* is distinguishable from the present case on the same ground. Thus it is *Holman*, not *Standard Airlines*, that controls.

The other case petitioners rely upon is *Trans-Pacific Freight Conf. of Japan* v. *FMB*, 302 F.2d 875 (D.C. Cir. 1962). There are two very large and important differences between that case and this one. (1) The order issued by the Maritime Board in *Trans-Pacific* was based solely upon a finding that the complaining parties before the Board would be irreparably injured if the order was not issued. There was no finding that in any respect the public interest required issuance of the order. By contrast, the order under review rests on a sufficient public interest finding. (2) The Maritime Board has no such grant of authority as does the FCC in Section 4(i) of the Communications Act or the FPC in Section 16 of the Natural Gas Act. Moreover, the court in *Trans-Pacific* relied heavily on the Board's

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[13] Petitioners attempt to distinguish *Holman* on the ground that it involved a suspension of an exemption. That will not do, for an exemption was also involved in the *Standard Airlines* case. Nor can *Holman* be disposed of by asserting that Congress had "explicitly reviewed and approved" the SEC's power. All that had happened was that a House report and a Senate report noted that the SEC's regulations contained the rules which were later at issue in *Holman*. Neither approval nor disapproval was "explicitly" given by even the committees, let alone by "Congress."

history of having disclaimed authority to issue temporary relief and of having repeatedly asked Congress to give it such authority. Very recently the Supreme Court has made clear that this is not a sufficient basis for finding an absence of power to accord interim relief.[14]

In other words, neither *Standard Airlines* nor *Trans-Pacific* can be taken as enunciating a general principle of administrative law divorced from the specific facts and statutory language which the case involved, especially where part of the court's reasoning is no longer acceptable. The question of the Commission's power to issue the interim order here must be resolved by examining, in light of closely analogous precedents, Congress' grant of power to the Commission, under Section 4(i) of the Communications Act, to issue rules and orders. Seen in this context, and with no real claim, let alone showing, of procedural unfairness to petitioners, the Commission's order should be upheld.

II. THE COMMISSION'S FINDINGS ADEQUATELY SHOW THAT THE INTERIM ORDER WAS REQUIRED IN THE PUBLIC INTEREST.

Apart from the question of statutory authority, petitioners argue that the interim order is not supported by valid findings. To the contrary, the findings are adequate to show that the hearing's purpose would be frustrated if no interim order were entered and hence that the order was required in the public interest.

Petitioners cite cases which indicate the criteria governing the issuance of a stay at the instance of a party who, having had his day in court and having lost, seeks postponement of the judgment while he pursues further judicial or administrative review. Assuming

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[14] See FTC v. Dean Foods Co., 384 U.S. 597 (1966).

those were the criteria governing the Commission in considering whether to issue the interim order under review, the essential criterion—that the public interest requires issuance of the order—has been met.

In *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F.2d 921, 927 (D.C. Cir. 1958), one of the cases petitioners cite, the court stated that "the public interest considerations . . . are crucial in this type of case." In *Yakus* v. *United States*, 321 U.S. 414, 440 (1944), where the Supreme Court upheld a statute forbidding stays pending judicial review of price control regulations, the Court said:

> "[W]here an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff."

Cf. Virginian Ry. v. *System Federation*, 300 U.S. 515, 552 (1937).

Moreover, the conclusion of the administrative agency on the public interest question is entitled to great weight. "Courts and administrative agencies are not to be regarded as competitors in the task of safeguarding the public interest." *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 15 (1942). A court should not substitute its "judgment as to the public interest for that of the Commission." *Associated Securities Corp.* v. *SEC*, 283 F.2d 773, 775 (10th Cir. 1963); see *Hamlin Testing Labs, Inc.* v. *AEC*, 337 F.2d 221 (6th Cir. 1964).[15]

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[15] *Associated Securities* and *Hamlin* are two of the cases cited by petitioners.

The Commission's "judgment as to the public interest" appears not only in the Memorandum Opinion and Order under review but also in the *Second Report and Order,* Docket Nos. 14895, 15233, and 15971, 2 F.C.C.2d 725 (1966), which adopted the CATV rules. There the Commission summed up its conclusions regarding CATV's potential impact on UHF, particularly non-network UHF stations:

> "123. There is no doubt as to the seriousness of the question posed. . . . if a CATV, with 12 or 20 channel capacity, can obtain very substantial numbers of subscribers in these same markets (by which we mean percentages of 50% or over), the UHF stations might face a very difficult hurdle. The audience for non-network stations is limited . . . and this limited audience might be greatly reduced since very substantial numbers of people interested in viewing the non-network programming would be watching the distant independents (e.g., those of New York or Los Angeles). We think this follows as a matter of common sense . . . . Finally, we point out that it is not just a matter of causing the demise of the independent UHF stations; if these stations' revenues are substantially reduced because of such CATV activity, so that they do not have the financial base to program effectively, the result is still a detriment to the public interest 'in the larger and more effective use of radio' (Communications Act, Section 303(g)). In short, the problem posed is whether, if CATV succeeds greatly—for example, to the 50 to 85% figure predicted by its optimistic proponents—there is correspondingly a grave danger to UHF broadcasting." 2 F.C.C.2d at 774-75.

"In view of these conclusions," the Commission said, "we think that our course of action is clear."

> "We must thoroughly examine the question of CATV entry into the major markets, and au-

> thorize such entry only upon a hearing record giving reasonable assurance that the consequences of such entry will not thwart the achievement of the Congressional goals. We cannot sit back and let CATV move signals about as it wishes, and then if the answer some years from now is that CATV can and does undermine the development of UHF, simply say 'Oh well, so sorry that we didn't look into the matter.' " [16] 2 F.C.C.2d at 776.

Crucial to the accomplishment of the goal of assuring that CATV operations will be consistent with the public interest was the necessity

> "to examine thoroughly such operations before they become established or well entrenched. Once entrenched, it is difficult, if not wholly impracticable in the light of the disruption which would result, to take effective action or to attempt to roll back the situation, if it should develop or be shown that the CATV operation is inconsistent with the public interest." 2 F.C.C.2d at 782.

This same concern for examining the public interest questions in advance was expressed in the Commission's discussion of the extent to which "grandfathered" CATV systems should be permitted to continue adding subscribers:

> ". . . Such systems, which may recently have gone into operation without regard to the Commission's

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[16] Although the Commission's distant signal rules and policies are chiefly directed to CATV systems' extending television stations' signals beyond their Grade B contours, the Commission also made clear that the same public interest questions are involved where part of one television market lies within the Grade B contours of stations in a different market, because as a practical matter the latter stations are "distant" stations in the first market. 2 F.C.C.2d at 786 n.69.

> explicit notice of the pendency of the paragraph 50 proposal, may have relatively few subscribers. In view of the public interest considerations upon which our policy is based, we do not believe that such a system should be allowed to expand from a few thousand subscribers in one part or suburb of a community to the potential of hundreds of thousands throughout the entire community, until there has been resolution of the serious issues presented (in an evidentiary hearing). . . . Finally, we wish to stress one important facet: We have previously put all parties on notice as to the pendency of our proposal and have now put parties on notice that there should not be expansion of major market systems from a few thousand subscribers to a very substantial number of subscribers until resolution of the public interest issues posed. We expect CATV operators to heed this notice and not to attempt to circumvent orderly consideration of any petition in this respect by an extraordinary effort to wire up the community or a substantial portion of it. In any event, we are requiring the submission of data showing the extent of construction of the system as of February 15, 1966. While we expect the ordinary wiring operations to have continued since that date, any extraordinary wiring efforts or entry into patently new geographical areas (e.g., extension of a system from a suburb into the main community) will be at the risk of the system and will not be accorded weight in the judgment to be made." 2 F.C.C.2d at 785-86.

These are the basic findings on which the Commission grounded its conclusion that interim relief *pendente lite* should be granted in a proper case. The findings the Commission made in the proceeding below amply support the application of the policy here. They show that unless a limit was placed upon further expansion by petitioners' CATV systems while the Commission

proceeding is underway[17] the outcome of the proceeding could well be frustrated. The Commission found:

(a) that San Diego, the 54th ranked market, is presently served by five television stations (R. 579);

(b) that there is considerable UHF activity in San Diego with a new station on the air, a construction permit outstanding for another station which plans to commence operations soon, and an application pending for still another station, which would be a non-commercial educational station (R. 587);

(c) that assignment of another UHF channel to San Diego is under consideration by the Commission (R. 579);

(d) that by carrying Los Angeles signals from 100 miles away CATV systems in the San Diego area, including petitioners', put those signals on an equal technical level with San Diego signals in the homes of subscribers (whether or not any or all of San Diego is within the Los Angeles stations' Grade B contours) (R. 589);

(e) that several of petitioners' CATV systems began operating two to four months prior to the commencement of the proceeding (R. 587);

(f) that although petitioners' CATV systems and the other CATV systems operating in the San Diego area then had relatively few subscribers

[17] Petitioners claim that the proceeding will take a long time. It may be noted by the Court that on October 25, 1966, Southwestern, with the concurrence of the other petitioners but not of intervenors, moved for a further delay in the hearings, now scheduled to begin December 6, 1966.

(approximately 17,000 on February 15, 1966, or about 4.6 per cent of the homes in San Diego County within KFMB-TV's Grade A contour), there was considerable potential for expansion (R. 588);

(g) that there are approximately 380,000 housing units in San Diego County and the CATV franchises outstanding cover communities having approximately 90 per cent of all homes in the county within the station's Grade A contour (R. 587-88);

(h) that there are approximately 294,000 homes, or 78 per cent of all homes in the county within the station's Grade A contour, in communities where CATV systems, including petitioners', are already operating and carrying Los Angeles signals (R. 588);

(i) that approximately 70 per cent of the populated area in unincorporated communities adjacent to metropolitan San Diego has been wired, with 30 per cent of the homes in this area already having become subcribers (*Ibid.*); and

(j) that unless this expansion is appropriately limited while the proceeding is underway thousands of new subscribers could be wired up within a very short period of time (R. 588).

The Commission also said that it "had made clear in the Second Report and Order the impracticability of withdrawing service, once established, because of its disruptive effect," and that it had "also made clear the strong public interest considerations which should be resolved before the establishment or entrenchment of

CATV substantially throughout an area such as San Diego is permitted." (R. 588).

In view of the foregoing, and in view of the "number of unresolved issues present," the Commission set the matter down for evidentiary hearing. (R. 588) It said the case presented "a classic case for a hearing" on the public interest questions involved in CATV carrying Los Angeles signals in the San Diego area. (R. 587) Finally, the Commission concluded, an interim order "appropriately limiting further expansion until resolution of the public interest issues is called for." (R. 588).

Intervenors respectfully submit that the Court cannot conclude that the Commission's judgment as to the public interest questions, which is, as we have noted, entitled to great weight, is erroneous. It may be true, as petitioners assert (Mission Brief, p. 15), that the Commission "does not *know* . . . whether irreparable injury would result to the public interest if a stay were not issued." (Emphasis added.) But the Commission should not be held to a standard of certainty. It is enough that its judgment is not shown to be arbitrary or capricious. That has not been shown and it cannot be shown.

Petitioners also claim that the interim order is invalid because the Commission did not find that without it intervenor Midwest would suffer irreparable injury.[18] The argument is misplaced. The petitioners in *Hamlin, Associated Securities,* and the other cases cited in Mission's brief were seeking to suspend the effective

[18] Petitioners also claim that the Commission did not find that a stay would not cause irreparable injury to them. Suffice it to say that petitioners did not, and still do not, show that they will suffer such injury if the interim order is affirmed.

date of an order which adversely affected their interests while they litigated further the legality of the order. It would stand to reason that a petitioner in such circumstances would have to show, *inter alia*, that he would suffer irreparable injury if the order become effective immediately, though subject to reversal later on. That is not the case here. The Commission granted the temporary relief that had been sought because it found that the public interest would suffer otherwise. It was not required to withhold temporary relief, in the face of such a finding, on the ground that a failure to grant the relief would not cause a petitioning party irreparable injury. Such a proposition, which defies common sense, is not supported by any case petitioners do or could cite.

III. PETITIONERS' CATV SYSTEMS ARE ENGAGED IN INTERSTATE COMMUNICATION BY WIRE OR RADIO AND ARE SUBJECT TO THE COMMUNICATIONS ACT AND TO FCC REGULATORY AUTHORITY.

A. CATV Constitutes "Interstate Communication by Wire or Radio" to Which the Act Applies.

Section 2(a) of the Communications Act, 47 U.S.C. § 152(a), provides that the Act shall apply "to all interstate and foreign communication by wire or radio" and to all persons engaged in such communication. Sections 3(a) and (b), 47 U.S.C. § 153(a), (b), define wire and radio communication as the transmission of writing, signs, signals, pictures and sounds by means of wire and/or radio, including "all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."

CATV receives, forwards and delivers communications and is incidental to wire and radio transmission. See *Clarksburg Publishing Co.* v. *FCC*, 225 F.2d 511,

517 (D.C. Cir. 1955). Moreover, CATV systems are part of the stream of continuous interstate communications by radio and television. They are thus within FCC jurisdiction even though located within a single state. See *Pacific Telatronics, Inc.*, 4 R.R.2d 145, 149 (1964); *Ward* v. *Northern Ohio Telephone Co.*, 300 F.2d 816 (6th Cir.), *cert. denied*, 371 U.S. 820 (1962); see also *United States* v. *American Tel. & Tel. Co.*, 57 F.Supp. 451, 454 (S.D.N.Y. 1944), *aff'd per curiam sub nom. Hotel Astor* v. *United States*, 325 U.S. 837 (1945); *Idaho Microwave, Inc.* v. *FCC*, 352 F.2d 729 (D.C. Cir. 1965).

Under the circumstances it is not surprising that petitioners do not quarrel with the basic proposition that their CATV systems are engaged in interstate communication. Indeed, the National Community Television Association (NCTA), the trade association of the CATV operators and manufacturers, has not only conceded but argued that CATV is in interstate commerce.[19]

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[19] "A community antenna television system is *directly concerned with television broadcasting, an area of governmental control of which there has been complete occupation by the Federal Government* . . . ." Brief of NCTA Before Conn. Public Utilities Commission, Docket No. 10250, p. 3 (1964). (Emphasis supplied.)

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"Briefs are being filed with the Nevada PSC, calling the attention of that Commission to the fact that CATV systems are *unquestionably engaged in interstate commerce* . . . ." Id., p. 9. (Emphasis supplied.)

* * *

"That community antennas are in interstate commerce for the purpose of inclusion in the broad field of radio and television may reasonably be argued . . . . [T]he Federal Communications Commission has actually exercised jurisdiction to promulgate rules and regulations affecting community antenna systems." *Id.* Ex. B, p. 20.

B. The Commission Has Power to Regulate CATV Systems.

Section 1 of the Communications Act, 47 U.S.C. § 151, directs the FCC to "make available to *all* of the people of the United States a rapid, efficient, Nationwide wire and radio communication service." There are two especially relevant statutory corollaries of this mandate. Section 307(b) of the Act, 47 U.S.C. § 307(b), requires that "the Commission shall make such distribution of licenses, frequencies, hours of operation and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." Section 303(h), 47 U.S.C. § 303(h), authorizes the FCC "to establish areas or zones to be served by any station." In accordance with these provisions, the FCC in 1952 established limitations on the power and height, and hence the service areas, of television stations. At the same time, it adopted a table of television assignments allocating specific channels to specific communities to provide television service oriented to meet the individual needs and interests of the community and area served. This nationwide plan of local and area television broadcast service was upheld by the courts, *Logansport Broadcasting Corp.* v. *United States*, 210 F.2d 24 (D.C. Cir. 1954); *Peoples Broadcasting Co.* v. *United States*, 209 F.2d 286 (D.C. Cir. 1953), and approved by the Congress in passing the all-channel receiver legislation (P.L. 87-529) in 1962. See H.R. Rep. No. 1559, 87th Cong., 2d Sess. 3 (1962); Senate Rep. No. 1526, 87th Cong., 2d Sess. 7 (1962).

Section 303(r) of the Communications Act, 47 U.S.C. § 303(r), authorizes the FCC to "make such rules and regulations and prescribe such restrictions and conditions not inconsistent with law as may be necessary

to carry out the provisions of this Act." See also Section 4(i). Accordingly, the FCC has the power to direct rules at CATV systems, which are instrumentalities of interstate communications by wire and radio, to ensure that CATV communications operations are consistent with and not harmful to this overall plan of local and area television service established in the public interest.

The FCC's power to regulate CATV operations indirectly by means of conditions in the licenses of microwave facilities which serve CATV was affirmed in *Carter Mountain Transmission Corp.* v. *FCC*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963). Not only the Communications Act but also various court decisions persuasively demonstrate that the FCC's authority to regulate is not confined to such indirect means but includes the power to regulate CATV systems directly.

In *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219 (1943), the Supreme Court stated that "in the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers." See also *American Trucking Ass'ns* v. *United States*, 344 U.S. 298 (1953), which affirmed the power of the ICC, acting under a similar legislative mandate, to regulate practices which would disrupt its scheme of regulation if allowed to continue unregulated. Addressing itself specifically to the question of FCC regulatory authority over CATV before the Commission had asserted that authority, the Court of Appeals for the District of Columbia Circuit intimated that the authority exists. *Clarksburg Publishing Co.* v. *FCC*, *supra*, 225 F.2d at 517. See also *Philadelphia Television Broadcasting Co.* v.

FCC, 359 F.2d 282, 284 and n. 5 (D.C. Cir. 1966); *Citizens TV Protest Committee* v. *FCC*, 348 F.2d 56, 62-63 (D.C. Cir. 1965).

The contention that if the FCC can regulate CATV it could, by the same token, regulate or control virtually any activity, such as movie theatres, newspapers or other activities which may be competitive with or ancillary to wire and radio communications, is simply hyperbole. FCC authority to regulate CATV is not based on any theory of "plenary power" to regulate all activities which have some connection with or relation to some aspect of interstate wire and radio communication. CATV systems are instrumentalities of interstate communications by wire and radio to which the Act applies, and CATV has a uniquely close relationship to a regulatory scheme established pursuant to specific authority under the Act. In the case of CATV, not only specific provisions of the Act but persuasive judicial precedent support FCC power to regulate CATV.

C. The Commission's Authority Is Not Confined to Regulation of Common Carriers and Licensing of Radio Stations.

Petitioners assert, however, that the Commission may not regulate a CATV system because it is not a common carrier by wire or radio under Title II of the Act and is not a radio station under Title III.[20]

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[20] Petitioners also argue that the Commission's assertion of direct jurisdiction over CATV is precluded by a prior Commission view that it did not have such jurisdiction and by past Commission attempts to obtain express legislative authority to regulate CATV even after issuing the *Second Report and Order*. We do not agree that in 1959 the Commission held that it had no jurisdiction over CATV. In *CATV Systems and Auxiliary Television Services*, 18 R.R. 1573 (1959), the Commission held that CATV systems could not be regulated as communications common carriers or as

Even if petitioners' premise were correct the conclusion would not follow. Title III of the Communications Act contains "provisions relating to radio," which includes television, not "provisions applicable only to broadcasters." The CATV rules very much *relate* to television. One purpose of the rules, for example, is to "generally encourage the larger and more effective use of radio [and television] in the public interest," Section 303(g), and the Act does not say this must be accomplished only by applying rules to broadcasters.

Moreover, the premise of the argument is unsound. Petitioners correctly assert that the Commission's "two principal" functions are the regulation of common carriers by wire and radio and the licensing and regulation of radio stations, and that the "primary purpose" of the Act is the same. But neither "principal" nor "primary" means "sole," and there is nothing in the Act to indicate that common carrier regulation and radio station licensing and regulation are the sole functions of the Commission. Nor can support for such a

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television broadcast stations. The Commission also held that it could not regulate CATV systems through the licensing of microwave facilities, a position which it later changed and which change was approved in the *Carter Mountain* case, *supra*. The Commission further found that it did not have "plenary power" to regulate CATV, but the Commission either did not consider, or expressly declined to rule with respect to, the legal grounds on which it ultimately based its direct regulation of CATV. 18 R.R. at 1595.

As to the Commission's efforts to obtain express legislative authority, it is necessary only to refer to Wong Yang Sung v. McGrath, 339 U.S. 33, 47 (1950), as recently reaffirmed in FTC v. Dean Foods Co., *supra*: a court should not infer "that an agency admits that it is acting upon a wrong construction by seeking ratification from Congress" because "public policy requires that agencies feel free to ask legislation which will terminate or avoid adverse contentions and litigations."

view be drawn from the fact that the 1934 Act merged the common carrier functions of the ICC and the radio licensing functions of the Federal Radio Commission into one unified act under a single agency. If anything, the merger freed the new Commission of the need to fit its regulatory actions into a particular subcategory of communications. The 1934 Act is "a comprehensive scheme for the regulation of interstate communication," *Benanti* v. *United States*, 355 U.S. 96, 104 (1957), and the Communications Commission was created "to regulate all forms of communication," H.R. Rep. No. 1850, 73d Cong., 2d Sess. 3 (1934), quoted in *Benanti*, 355 U.S. at 104 n. 14.

Petitioners' argument has been effectively disposed of in a closely analogous situation. In *Carter Mountain Transmission Corp.* v. *FCC*, *supra*, the Commission denied an application for common carrier microwave facilities to relay distant television signals to three CATV systems because of the likely impact on local television broadcast service. The court rejected the argument that the Commission should not have applied principles of radio broadcast law to an application for common carrier facilities.

> "Here the Federal Communications Commission is charged with the duty of regulating not only common carriers by radio but broadcasters of television programs. It cannot let its decisions in the radio carrier field interfere with its responsibilities in the television broadcasting field. In both fields, it must 'make available, so far as possible, to all the people of the United States,' adequate and efficient service. See Section 1 of the Communications Act of 1934, as amended, 47 U.S.C. § 151 (1958). . . . The interest of the listen-

ing and viewing public in better and more effective service is paramount." 321 F.2d at 362.[21]

Little doubt should remain, after *Carter Mountain*, that the Commission may regulate CATV as an integral part of television broadcasting. CATV is interstate communication by wire and—like a common carrier—is within the literal terms of Sections 1 and 2(a) of the Communications Act. The Commission "cannot let its decisions in the [CATV] field interfere with its responsibilities in the television broadcasting field." 321 F.2d at 362. Whether it is CATV or a common carrier that is being regulated, "the interest of the listening and viewing public in better and more effective service is paramount." *Ibid.* The Commission has sought to integrate CATV into the national television

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[21] *Carter Mountain* also disposes of petitioners' argument, predicated upon Regents of the University System v. Carroll, 338 U.S. 586 (1950), that such provisions as Section 307(b)—as well as Sections 303(g), (h), (r), (s)—are relevant only in the Commission's exercise of its "title III jurisdiction" to license radio stations. The applicant in *Carter Mountain* had sought a certificate of public convenience and necessity, pursuant to Section 214(a) of the Act, which is in Title II, but the court held that Section 307(b) and other "title III" principles provisions were controlling.

The *Regents* case had nothing to do with this question. There the Commission had renewed a broadcast license on condition that the licensee repudiate a stock purchase contract with a third party. The licensee did so. There appears to have been no express provision in the contract making it subject to the approval of the Commission. The Supreme Court merely held that the third party could recover for breach of the contract from the licensee. This is all the case stands for and nothing more. Petitioners can draw no solace from the Court's language to the effect that the Commission could make a choice only within the scope of its licensing power. The Court's observation related to the issue which was before the Commission, *i.e.*, whether the Commission had the power to affect the rights of a third party, who was not subject to the Communications Act, vis-a-vis a licensee.

structure and to ensure that CATV supplements rather than supplants that structure. In this fashion the Commission is attempting to meet its statutory obligation to "generally encourage the larger and more effective use of radio in the public interest," Sec. 303(g), just as it was attempting to meet that obligation in 1952 when it first established a Table of Allocations governing the national television structure.

D. The Commission's CATV Regulations Are Properly Designed to Minimize Disruption of the National Television Structure Which Congress Has Approved.

Television broadcasting was a young industry in the late 1940's, when the Commission undertook to chart the industry's future. AM radio had developed helter-skelter, with license grants made essentially on an *ad hoc* "demand" basis with little effort to relate any particular application, except insofar as electrical interference was concerned, to the number and location of radio stations that were in existence at the time of the application or that could come into existence later. The Commission took hold of television at an early stage and developed a comprehensive plan under which available channels were to be allocated to different communities and areas. The allocation was designed to satisfy, "so far as possible," two different public interest goals—(1) at least one, and preferably more than one, off-the-air service for "all the people of the United States," and (2) local or area television stations for as many communities as possible. Maximum fulfillment of the first goal alone would suggest having a substantial number of superpowerful stations in a handful of strategically located cities, and the so-called DuMont plan called for essentially such a channel allocation plan. This approach, however, was

thought by the Commission to represent too great a sacrifice of the second goal (because of electrical interference problems). Local and area stations could tailor their programming—for instance, news and discussion of local or regional affairs—to the needs and interests of the people in the communities the stations served, thus giving those people both national and locally oriented programming instead of only the former. The DuMont plan was therefore rejected. Channel allocations were made with an eye toward a balance between the two goals described above. As a necessary corollary, specified limits were placed upon tower heights and transmitter power, thus "establish[ing] areas or zones to be served by any stations," Sec. 303(h).[22] The Table of Allocations adopted in 1952 is basically the same type of Table in use today, although a great many small changes have been made over the years, as experience was acquired.[23] The Commission's approach was sustained in court against precisely the same kind of arguments as are made in the Mission brief, pp. 40-42. *Logansport Broadcasting Corp.* v. *United States*, *supra*; *Peoples Broadcasting Co.* v. *United States*, *supra*.

The original Table contemplated use of both UHF and VHF channels. By 1962, there were 500 VHF stations on the air (of a total of 681 channels allocated) but only 103 UHF (out of 1,544 channels allocated). Thus, 93 per cent of the available UHF chan-

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[22] See Sixth Report on Television Allocations, 1 R.R., Part 3, 91:599 (1952); 47 C.F.R. § 73.606(b).

[23] The latest version of the Table, adopted in the Fifth Report in Docket No. 14229, released Feb. 11, 1966, provides for one or more television channel assignments to each of 792 different cities in the continental United States. 2 F.C.C.2d 527, 551 (1966).

nels were idle. With little public demand for "all-channel" sets, only 16 per cent of television receivers in American homes in 1962 could receive UHF, and only 6 per cent of sets produced in 1961 could do so. H.R. Rep. No. 1559, 87th Cong., 2d Sess. 2 (1962). The House Commerce Committee said:

> "If the American people are to have the chance to enjoy the benefits of television service to the fullest degree, then a major portion of the UHF channels not now assigned must be put into operation." (*Ibid.*)

Congress thereupon took the extraordinary step of enacting the "all-channel" receiver law, which enabled the Commission to require all television sets shipped in interstate commerce (or imported from abroad) to be capable of receiving all of the UHF and VHF television broadcast frequencies. Act of July 10, 1962, 76 Stat. 150, adding Secs. 303(s) and 330 to the Communications Act. The Commission has implemented the statute by appropriate regulations. 47 C.F.R. § 15.65(a).

The all-channel receiver law represents clear congressional approval of the policy decisions that underlay the adoption of the Table of Allocations. The House Committee Report declared "the goal" to be

> "a commercial television system which will (1) be truly competitive on a national scale by making provision for at least four commercial stations in all large centers of population; (2) provide at least three competitive facilities in all medium-sized communities; and (3) permit all communities of appreciable size to have at least one television station as an outlet for local self-expression." (*Id.* at 3.)

The committee might as well have said that San Diego was not to be a part of the Los Angeles television market but was instead to have as many San Diego television stations—at least four commercial stations—as the available audience could support. The Commission has voiced the fear that its goals and the goals set forth in the committee's report will be frustrated if CATV systems are permitted to transport television signals from a few huge metropolitan areas like Los Angeles, New York, and Chicago into other cities and communities throughout the United States.

Underlying the Commission's concern is a basic proposition of broadcasting economics, *viz.*, that a station's revenues—and hence its ability to survive and to offer quality programming—is a direct function of its audience. If all the people of San Diego, for example, could view all the San Diego and Los Angeles stations, present and potential San Diego stations would suffer a sharp reduction in their audiences. If these San Diego stations were driven off the air, to take the extreme case, San Diego would not even have "at least one television station as an outlet for local self-expression," the bare minimum contemplated in the House Report for "all communities of appreciable size." If the VHF stations survived but the existing and future UHF stations did not, San Diego would have only three English-language stations, one of them broadcasting from Mexico, and the higher prices San Diegans pay for television sets because of the all-channel receiver law would be wasted. Even if all the local and area stations could continue to operate, the audience fragmentation would almost certainly impair the quality of their programming and hinder future efforts to improve service or programming.

E. Petitioners' CATV Systems Are Not Mere "Master Antennas."

Petitioners argue that if the Commission needed express legislative authorization before it could require that television sets be capable of receiving all channels, express legislative authorization is needed before CATV can be regulated to prevent frustration of the national television goals. Moreover, say petitioners, if the Commission now has statutory authority to issue the CATV rules it *ipso facto* has authority (a) to bar the erection by individual viewers of "tall receiving antennae," (b) to prevent the sale in San Diego of television sets "capable of receiving Los Angeles television station signals," and (c) even to issue rules "requiring television viewers to tune their sets only to their home community stations." The premise of this series of assertions seems to be that petitioners' CATV systems are merely an extension of the home receiver whose only purpose is to improve television reception.

This "master antenna" argument has been effectively laid to rest not only by the Commission, 2 F.C.C. 2d at 780, but also by a district court. In *United Artists Television, Inc.* v. *Fortnightly Corp.*, 255 F. Supp. 177, 195 (S.D.N.Y. 1966), a case involving copyright liability of CATV systems, the court said flatly:

> "Defendant's [CATV] systems are not passive antennas. They consist of sophisticated, complex, extremely sensitive, highly expensive equipment, especially constructed and designed to reproduce the electromagnetic waves received from the originating television station and to propagate and transmit the new electromagnetic waves through an elaborate network of coaxial cables. The term 'passive' signifies a device which does not add energy to any of the signals being handled by the

system. In that sense, only the antenna and the cable are passive. All of the other equipment, such as the preamplifiers, 'Teletrol' demodulators and modulators, WCON converters, 'Channel Commanders' and line and distribution amplifiers, used by defendant's systems at various times, are active, not passive.

"The intensity of the electromagnetic waves as received at defendant's antenna is insufficient to enable them to travel along the coaxial cable to the subscribers and to produce an acceptable or viewable picture without the reproduction of the signals received on new locally supplied energy at higher intensity by defendant's elaborate electronic equipment."[24]

Unlike CATV systems, people watching television in their living rooms are not engaged in communication by wire, nor are they so engaged if they build tall antennas on their houses, nor are television set manufacturers so engaged, and the Commission neither possesses nor claims the power to regulate either viewers or manufacturers.

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[24] The court went on:

"The dominant, over-all function and design of defendant's systems at all times—regardless of the individual instruments or specific equipment used from time to time—were and are aimed at the objective of propagating electromagnetic energy for the purpose of transmitting TV program material to a large number of subscribers, who are, in effect, their audience. In view of the foregoing characteristics, defendant's systems are, in material respects, analogous to television stations, translator and repeater stations.

"Defendant's systems are communication systems for the reasons that they were designed and engineered to, and do, convey information from one location to other locations." 255 F. Supp. at 196.

F. The Eighth Circuit Proceeding.

Finally, we note that the *Second Report and Order* is before the Court of Appeals for the Eighth Circuit for review.[25] One of the contentions made there is that the Commission lacks the power to regulate CATV systems that do not receive signals through microwave radio relay. The certified index to the record of the Commission proceedings leading up to the *Second Report and Order* is also in the Eighth Circuit. That record contains 1,593 separate items totalling 5,322 pages; the index alone is 105 pages long. Thus, to the extent that consideration of the record is necessary to review the Commission's findings, on impact and the like, in support of its power to adopt the CATV rules, that task cannot easily be performed by this Court. Moreover, under the review statute under which the Eighth Circuit proceedings were brought, that court has "exclusive jurisdiction" to review the validity of the *Second Report and Order* upon direct appeal from that action. 5 U.S.C. § 1039. For these reasons the Court might consider that it need do no more than satisfy itself that the Commission has not "patently traveled outside the orbit of its authority" by determining whether the alleged lack of jurisdiction "is apparent on the face of the order," *cf. FPC* v. *Arizona Edison Co.*, 194 F.2d 679, 685-86 (9th Cir. 1952). In this connection, intervenors respectfully point out that before the *Second Report and Order* was adopted another court of appeals had suggested that the Commission was probably empowered—if not required—to regulate CATV because of its apparent impact upon television broadcasting. *Citizens TV Pro-*

[25] Midwest Video Corp., *et al.* v. United States, *et al.*, Nos. 18,052, 18,481, 18,482, 18,348.

test Committee v. *FCC, supra,* 348 F.2d at 62-63. More recently the same court held that the Commission is permitted to choose to regulate CATV systems "as adjuncts of the nation's broadcasting system" rather than as common carriers, noting that the Commission's assertion of jurisdiction in the *Second Report and Order* "is substantial enough" to justify its refusal to assert common carrier jurisdiction over CATV. *Philadelphia Television Broadcasting Co.* v. *FCC, supra,* 359 F. 2d at 284 and n. 5.

IV. NEITHER THE ORDER UNDER REVIEW NOR THE CATV RULES VIOLATE THE FIRST AMENDMENT.

Petitioners argue that the CATV rules and the order under review are unlawful because they impose a "prior restraint" on petitioners' "right" to carry the television signals they choose to carry, in violation of the First Amendment.[26]

We need not stop here to debate the abstract question whether CATV systems are "entitled to the protection of the First Amendment." Presumably everyone is so entitled, but petitioners, like newspaper publishers, "are engaged in business for profit exactly as are other businessmen who sell food, steel, aluminum, or anything else people want," *Associated Press* v. *United States,* 326 U.S. 1, 7 (1945), and in conducting that business they are subject to reasonable and proper laws and regulations. Nor is it of use to debate the concept of "prior restraint"; we will assume for the sake of

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[26] Although the argument is addressed to the rules generally, only the distant signal rules and policies and their application are involved on this appeal. The order under review does not require petitioners to carry any particular television station or to afford any station non-duplication treatment.

argument that whatever "restraint" has been imposed is a "prior" restraint.

The Commission has concluded that people in cities like San Diego will in the long run be better off with a wider choice of off-the-air television services. It has concluded (tentatively, at this preliminary stage) that unchecked expansion of CATV carrying Los Angeles signals could prejudice that goal—and unfairly, at that. Petitioners merchandise in San Diego the Los Angeles signals they pluck from the air without the permission of or payment to the originators of those signals; they bring to San Diego many programs that have been purchased by San Diego area stations for exclusive broadcast in San Diego. The real issue here is whether the Commission, having reached the conclusions it reached, has abridged free speech—in the constitutional sense—by limiting CATV activities which, to quote this Court, "could be described as '* * * inconsistent with a finer sense of propriety * * *' . . ." *Cable Vision, Inc.* v. *KUTV, Inc.*, 335 F.2d 348, 352 (9th Cir. 1964).

In considering this question, it must be assumed that the Commission has jurisdiction to regulate CATV and that it has properly asserted that jurisdiction in keeping with its statutory mandate to "encourage the larger and more effective use of radio in the public interest" (Communications Act, § 303(g)), "to establish areas or zones" served by television stations (§ 303(h)), to "provide a fair, efficient, and equitable distribution of radio service" to each of the several states and communities (§ 307(b)), as well as to encourage the development and expansion of a nationwide system of television service provided by local and area television stations—the express congressional

policy underlying the enactment of the all-channel receiver legislation.

As we have shown above, the Table of Allocations, with its associated limits on power and tower height of television stations, has long governed the location and service areas of television stations. The multiple ownership rules and duopoly and concentration rules have long controlled the number and location of television stations which an entity may own or control and the extent to which the signals of its stations may be extended. The rules and policies with respect to the operation of so-called satellite stations and translator stations also limit the extension of the signals and hence of the programs of particular stations. None of these Commission rules or policies is subject to First Amendment challenge on the ground that it limits the range of the signals of television stations. *Cf. National Broadcasting Co.* v. *United States*, *supra*, 319 U.S. at 226-227. No such rule or order has ever been struck down on First Amendment grounds. Certainly it is clear that a CATV system has no greater rights under the Constitution to extend the signal of a broadcast station than the station itself has. When the Commission determines that a CATV system may not transmit the signals of a television station it is not regulating program content. It is merely determining where and under what circumstances the signals of those stations may be carried. This is precisely what the Commission does with television stations. The FCC is not required in the name of free speech to allow the stations in Los Angeles to operate satellite television stations and translators in San Diego and throughout the United States for the purpose of having their signals transmitted nationwide.

Petitioners argue that Commission regulation of communications is justified only by the "scarcity of radio frequencies," and that, since petitioners' CATV systems do not use "radio frequencies," they cannot constitutionally be regulated. The premise of the argument is not sound. If "scarcity of radio frequencies" were the only excuse for regulation of communications, a great deal of long standing—and obviously valid—regulation would be unconstitutional. For example, by virtue of Section 214 of the Act the Commission possesses—and exercises—the power to limit or prohibit the expansion of telephone and telegraph communication services into new geographic areas. Similarly, under Section 605 no one who has received any interstate or foreign communication by wire or radio—other than radio broadcasts—may retransmit such communication other than through authorized communications channels, and no one may intercept any such communication and divulge its contents without being authorized by the sender. See *Benanti* v. *United States*, 355 U.S. 96 (1957); *United States* v. *Fuller*, 202 F. Supp. 356 (N.D. Cal. 1962). In neither of these situations can there be any argument that Congress is without power to regulate merely because "speech" is involved, and yet these statutory provisions are not based upon "scarcity of radio frequencies."[27] Moreover, the principal case petitioners

[27] Federal powers to regulate interstate "transmission of intelligence" can be traced back at least 100 years, long before there was radio and a "scarcity of radio frequencies," and those powers "are not confined to the instrumentalities of commerce . . . known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances." Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. (6 Otto.) 1, 9 (1877).

rely on, *National Broadcasting Co.* v. *United States*, *supra*, squarely rejects the underlying assumption of petitioners' argument. The Court said that it could *not* "regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other." 319 U.S. at 215.

Petitioners' reliance on the state court decision in *Weaver* v. *Jordan*, 411 P.2d 289 (Calif. 1966), *cert. denied*, 385 U.S. — (1966), is entirely misplaced. There is not here, as there was there, "a complete ban of expression and communication through a specified medium," 411 P.2d at 295. The state statute the court struck down there totally prohibited subscription television in California, whether by closed circuit cable or through the air. Here, by contrast, are rules, policies and an order expressly grounded in public interest findings by the Federal agency which is given the primary responsibility for regulation of the communications industry in the public interest. The *Weaver* decision itself noted that "the practices or business of the various media of expression or of those disseminating their beliefs or ideas may be regulated or taxed in a reasonable or nondiscriminatory manner," 411 P.2d at 297, and it distinguished the "sweeping suppression" of subscription television accomplished by the act involved there with the rules upheld in *National Broadcasting Co.* v. *United States*, *supra*, which were designed "to *avoid* practices which would hinder growth of new networks and would deprive the listening public in many areas of service and would deprive local stations of much of their choice of programs," 411 P.2d at 298-99.

CATV systems are engaged in interstate communication by wire and by radio. They are an integral part of the television broadcast system. They are subject to direct regulation by the FCC. The Commission is required to exercise its regulatory powers to further the "public interest" in "the larger and more effective use of radio," Section 303(g). "The interest of the listening public in better and more effective service is paramount." *Carter Mountain Transmission Corp.* v. *FCC*, *supra*, 321 F.2d at 362. Indeed, the distant signal rules are expressly designed to advance true freedom of speech—the freedom of all the people, rich and poor, urban and rural, to be exposed to the widest possible variety of both national and local news, viewpoints and entertainment. In the expert judgment of the FCC that freedom—and the correlative right of broadcasters to present the news, viewpoints and entertainment—would be injured by unchecked development and expansion of CATV carrying distant signals. For this Court to strike down distant signal regulation on First Amendment grounds would require the Court to conclude that the Commission's judgment was totally arbitrary and unreasonable. Intervenors respectfully suggest that the Court should not and cannot reach such a conclusion. *Cf. Associated Press* v. *United States*, *supra*, 326 U.S. at 20:

> "It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possi-

ble dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society . . . . Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."

V. ADOPTION OF SECTION 74.1109 DID NOT VIOLATE SECTION 4 OF THE ADMINISTRATIVE PROCEDURE ACT.

Petitioners argue that Section 74.1109, which authorizes the interim order being reviewed here, is illegal because it was adopted without observance by the Commission of the requirements of Section 4 of the Administrative Procedure Act. It is asserted that there was no notice that such a rule might be adopted and that petitioners were deprived of the opportunity to "present arguments in opposition" to its adoption.

This contention can and should be rejected because, in all the voluminous pleadings filed by petitioners below, this issue was not raised in the proceeding before the Commission. See Section 405 of the Communications Act. Nor does it appear in the petition for reconsideration of the rules and the *Second Report and Order* filed by Mission, which is now pending before the Commission, or in the "Statement of Position" (R. 363-76), filed by Southwestern in this proceeding, which the Commission is considering in connection with the petitions for reconsideration (R. 583).

The contention is also lacking in merit, apart from its lack of timeliness. The fact that petitioners still have not made to the Commission any of the "arguments in opposition" to Section 74.1109 which they

claim they were illegally denied the chance to make shows that this contention is an empty abstraction.

In the *Notice of Inquiry and Notice of Proposed Rule Making,* 1 F.C.C. 2d 453, issued April 23, 1965, the Commission divided the CATV rule making into two parts. Part I was to be expedited and would deal, insofar as relevant here, with interim solutions to the distant signal problem while the longer range inquiry in Part II was underway. The *Notice* expressly "put all persons who now operate or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not." 1 F.C.C.2d at 477. The nature of these proposed rules had been indicated in earlier portions of the *Notice.* The Commission invited comment on possible measures to govern the "conditions under which CATV should be permitted to operate in areas [like San Diego] with potential for independent stations." In the interim, applications for microwave facilities to relay television signals to CATV systems in such areas would not be granted without "a clear and full showing that in the particular circumstances a grant would not pose a substantial threat to the development of independent UHF service in the area." Comments were also invited on an interim proposal to apply the same policy to non-microwave CATV systems. An example, but only an example, of this proposal was a rule prohibiting extension of the signal of a television station beyond its Grade B contour into an area with potential for independent stations without the showing microwave applicants would have to make. 1 F.C.C.2d at 471-72.

The Association of Maximum Service Telecasters, Inc. ("MST"), which had been one of the early pro-

ponents of direct FCC regulation of CATV, filed "Part I" comments regarding this proposal. Its comments received wide publicity. MST urged that the Commission adopt two kinds of interim rules to deal with the importation of distant signals. First, MST proposed a general prohibition on CATV extension of stations' signals beyond their Grade B contours except in particular limited circumstances. Second, because the Grade B contour did not appropriately define a distant signal for purposes of the policy behind the distant signal regulation, MST proposed that the Commission establish procedures to limit CATV importation of signals from one market into another, in appropriate circumstances, even where the system operated within the Grade B contours of the stations in the distant market.[28]

Intervenor Midwest also filed comments in the rule making proceeding. Midwest focused sharply on the fact that CATV systems in the San Diego area were carrying the signals of Los Angeles stations and showed that if the practice were permitted to continue and increase the result would threaten existing and proposed television broadcast service in the San Diego area. Midwest's comments also incorporated by reference the comments of MST, of which Midwest's San Diego station is a member, and proposed that the Commission's interim distant signal rules be applicable as of April 23, 1965.[29]

Thus there was clear notice in the comments of proposed interim rules that would limit or prohibit the carriage of Los Angeles signals by petitioners' CATV

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[28] Relevant excerpts from the MST comments are reproduced in the Appendix.

[29] Midwest's comments are also excerpted in the Appendix.

systems in the San Diego area, either by a general prohibitory rule applicable to carriage of non-Grade B signals or by special procedures relating to carriage of signals from other markets whether or not they were Grade B signals. And Midwest expressly proposed that the rule be applicable as of April 23, 1965. This put petitioners on notice that the Commission might by rule direct any new system starting operations after that date to discontinue operating; also, any substantial expansion of an existing system after April 23 would be required to cut back to conform to the rule. The interim rules and policies actually adopted in the *Second Report and Order* were less stringent than these proposals.

Notice of a counter-proposal made by a participant in a rule making proceeding is notice within the meaning of the Administrative Procedure Act. *Owensboro on the Air, Inc.* v. *United States*, 262 F.2d 702 (D.C. Cir. 1958), *cert. denied*, 360 U.S. 911 (1959). Moreover, petitioner Trans-Video had actual notice of the Midwest comments, for it filed comments expressly replying to them.[30] Thus, wholly apart from the fact that similar proposals were later made by MST and Midwest in their so-called Part II comments, which were also before the Commission while it was considering the rules ultimately adopted in the *Second Report and Order*, petitioners had notice of proposed rules that were more stringent than the rules the Commission adopted. Nor can petitioners complain that the rules are not labelled "interim" rules. This too is a formalistic objection devoid of all substance. All

[30] Trans-Video is the parent of petitioners Mission and Pacific and operates their CATV systems. It also operates the CATV system owned by petitioner Southwestern.

rules, whether "interim" or "final," are subject to change, and the Commission expressly said the CATV rules will be revised or terminated, as further experience indicates. 2 F.C.C.2d at 786.

Section 4(a) of the Administrative Procedure Act requires that the notice of proposed rule making include "either the terms or substance of the proposed rule or a description of the subject and issues involved." This provision must be interpreted in practical, not abstract, terms. "Surely every time the Commission decided to take account of some additional factor it was not required to start the proceedings all over again. If such were the rule the proceedings might never be terminated." *Logansport Broadcasting Co.* v. *United States*, 210 F.2d 24, 28 (D.C. Cir. 1954); see *CAB* v. *State Airlines, Inc.*, 338 U.S. 572 (1950); *Chicago St. P. M. & O. Ry.* v. *United States*, 322 U.S. 1 (1943); *Florida Economy Advisory Council* v. *FPC*, 251 F.2d 643, 648 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 959 (1958); *City of Dallas* v. *CAB*, 221 F.2d 501, 504 (D.C. Cir. 1954), *cert. denied*, 348 U.S. 914 (1955). Even without regard to the proposals of MST and Midwest, petitioners' argument should be rejected, for the *Notice* was "as specific as the Commission could have made it at the time." *Wilson & Co.* v. *United States*, 335 F.2d 788, 795 (7th Cir. 1964), *cert. denied*, 380 U.S. 951 (1965). The Commission was not required to allow the public interest to suffer through more delay in adopting CATV rules.

CONCLUSION

The order under review was within the Commission's power to issue. It is adequately supported by proper findings. The CATV rules on which the order

is based are also within the Commission's statutory authority and neither the rules nor the order contravenes the Frst Amendment. Finally, Section 74.1109 does not violate Section 4 of the Administrative Procedure Act.

Accordingly, the order should be affirmed.

Respectfully submitted,

ERNEST W. JENNES
CHARLES A. MILLER
JOHN E. VANDERSTAR
Covington & Burling
701 Union Trust Building
Washington, D. C. 20005

Attorneys for Intervenors
Midwest Television, Inc.
(KFMB-TV),
Jack O. Gross (KJOG(TV)),
and
San Diego Telecasters, Inc.
(KAAR)

Of Counsel:

MILLER & SPIEGELMAN
986 Mills Building
220 Montgomery Street
San Francisco, California 94104

Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN E. VANDERSTAR

APPENDIX

Excerpts from Comments of Association of Maximum Service Telecasters, Inc., submitted on July 26, 1965, to the Federal Communications Commission in "Part I" of the rule making proceeding in Docket Nos. 14895, 15233 and 15971:

* * *

C. Effective Interim Rules Should be Established Immediately and They Should Apply to Franchised and Operating, as Well as Prospective, CATV Systems.

100. The surge of CATV activity which we have described has continued unabated notwithstanding the Commission's actions of April 23, its statement to local franchising authorities in paragraph 50 of the April 23 *Notice of Inquiry* that they should proceed with caution and its warning to all existing and prospective CATV operators in paragraph 65 of the *Notice* that CATV operations may be subject to comprehensive regulation. Indeed, MST knows, and asserts without fear of contradiction, that various CATV interests since April 23 have been urging local authorities to grant franchises as fast as possible before the Commission issues further rules. Since April 23, CATV applications have been filed in at least 350 communities and granted in more than 200 communities. (*Television Digest CATV Activity Addenda*, April 26-July 19, 1965).

101. The need for immediate implementation of interim procedures to produce order out of chaos is clear and compelling. Hence, MST strongly supports the immediate adoption of interim rules, applicable to *all* CATV systems, designed to ensure that CATV does not jeopardize the growth and development of free television broadcast service pending adoption of effective long-range regulations to govern CATV.

102. There are a number of considerations which persuasively point to the nature and scope of the relief which is required. *First*, UHF development is important, regardless of the size of the market. *Second*, UHF development is important, whether it will provide additional tele-

vision service to a vast metropolis or whether it will provide the first television service to a small city, or whether it will provide service to rural areas. *Third*, paragraph 49 of the *Notice of Inquiry* focuses on CATV activity in communities to which UHF channels are assigned and not on the entire service areas of present and potential stations. Moreover, paragraph 49 appears to focus unduly on a showing by a particular CATV system as to the effect of the operations of that system in the particular community in question on the maintenance and development of UHF service. But, to attempt to determine whether the importation of distant signals by a *single* CATV system in a *single* community would pose a substantial threat to UHF television broadcast service without regard to the total number of CATV systems operating, franchised or for which applications are pending or with respect to which there is other evidence of CATV activity within the entire service area of a given existing or prospective station is to approach the situation with blinders. The effect of any one system can be minimal, while as Mr. Frederick Ford put it so cogently (see paragraph 91 above), the total impact would be such that: "Ultimately, the ability of the station to adequately serve the public or even to survive could become questionable." *Fourth*, what is involved here is an *interim* policy. As the Commission put it, its "responsibilities are not discharged . . . by waiting 'until the bodies pile up' " before recognizing that a problem exists and doing something about it (FCC 65-335, para. 48(3)). While the Commission is deciding, as it will in the subsequent stages of these proceedings, what comprehensive regulations are required of CATV, it has no alternative but to make sure that the house does not burn down before the fire engine is built.

103. The most direct and effective interim rule would provide that, while the Commission is proceeding with the formulation of its final rules to deal comprehensively with long-range CATV regulation, no CATV system shall be

permitted to extend the signal of any television broadcast station beyond its Grade B contour except upon a clear and full showing (a) that there are special circumstances, for example, that the community is remote and isolated and does not have, and cannot be expected to receive in the future, direct off-the-air local or area television service; *and* (b) that the operation of the CATV system, taken together with the operations of all other CATV systems operating or franchised or which are being proposed in the area in question, would not pose a substantial threat to the maintenance or the expansion of any existing UHF station or the development of new UHF service in the area. For the purposes of this rule, in all situations the coverage of a UHF station, existing or potential, should be treated as if the station were operating with the maximum facilities permitted by the rules of the Commission. Such an approach to coverage would encourage both the improvement of existing UHF facilities and the use of maximum facilities by potential new UHF stations.

104. The foregoing rule should be made effective immediately upon its publication[1] and should be made applicable to all CATV systems proposed on or after April 23, 1965, the date of the release of the Commission's *First Report and Order* and its *Notice of Inquiry and Notice of Proposed Rule Making*. Any CATV system which has commenced construction or operations or which was in existence prior to April 23 but which has substantially expanded its lines or the number of its subscribers in the community in question or has increased the number of stations carried since April 23 should be required to modify its operations to the extent necessary to bring it into conformance with the interim rule. Such action by the

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[1] Section 4(c) of the Administrative Procedure Act provides that any rule issued by an administrative agency may be made effective as of the date of its publication "upon good cause found and published with the rule". In view of the urgency of the situation, the Commission clearly has good cause to make the rule effective as soon as possible.

Commission is entirely reasonable in light of its admonition in the *Notice of Inquiry* to all existing and prospective CATV operators:

> "[W]e believe it appropriate, as requested by one of petitioners, to put all persons who now operate or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not." (FCC 65-334, para. 65).

In this connection, it should be noted that various aspects of the regulations indicated by the Commission go further than is proposed here. Paragraphs 51, 52 and 53 of the *Notice of Inquiry* dealt with general and final rules on the extension of television signals by CATV as well as so-called "leap-frogging".

105. An alternative but much less satisfactory approach in view of the CATV activity since April 23 would be to apply the interim rule (a) to all CATV systems which become operative on or after the publication of the rule, regardless of the date of franchise, and (b) to any CATV system operating on the date of publication of the rule which thereafter substantially expands its lines or the number of its subscribers or which increases the number of stations carried.

106. In any event, whatever the timing, the Commission should make clear that to the extent it does not require any existing system to cut back operations which are inconsistent with the interim rule, the Commission does not thereby intend in any way to extend any "grandfather" rights to such CATV systems and that such operations will be subject to modification or curtailment as may be required by the final rules adopted by the Commission.

* * *

IV. The Commission Should by Special Rules Provide Summary Procedures to Handle Requests for Other or Different Treatment Than Provided for in the Rules.

109. The Commission should adopt a specific rule providing for summary, non-hearing, procedures to handle claims for exceptions from any particular provision of the CATV rules and to handle requests for other or different treatment than is provided for in the rules, including the carriage, non-duplication and interim UHF rules. Such procedures would, for example, allow a party to whom the rules directly apply to seek a special exception from the rules or other special relief upon a showing of special circumstances or conditions justifying such treatment and would allow any other party affected by the rules to obtain an exception or special relief upon a similar showing.

110. In its *Notice of Further Proposed Rule Making and Notice of Proposed Rule Making* in Docket Nos. 14895 and 15233, the Commission proposed adoption of specific procedures whereby a party could seek special relief by showing that provisions of the then proposed CATV rules should not apply in the particular circumstances of the case (FCC 63-1128, paras. 10-11 and proposed Sections 11.557 and 21.711). However, in its *First Report and Order* the Commission has deleted these proposed provisions, stating:

> "The Communications Act and our normal rules prescribe the procedures to be followed in considering applications for permits, licenses and other authorizations. Further, we have provided generally for the consideration of requests for waiver of any rule. (See Section 1.3 of the Rules.)" (FCC 65-335, para. 155).

However, neither existing procedures under the Act and the Commission's normal rules relating to applications nor the general waiver provision are adequate.

111. The present procedures for considering applications for permits, licenses and other authorizations would at the most only be applicable in the case of applications for microwave authorizations intended to serve CATV systems. Since the Commission has not asserted any general licensing authority over CATV systems, these procedures would not be applicable directly to CATV systems themselves and the Commission is proceeding to regulate CATV systems directly.

112. Nor does Section 1.3 of the existing rules afford an adequate procedure. This provision relates solely to the waiver of a rule. At best, it is doubtful that any party other than one to whom a rule is directed could request such a waiver. Thus, it is questionable whether a local broadcast station, for example, could seek the waiver of a rule which required or allowed a CATV system to carry the signal of another station in lieu of its signal. Moreover, even if it could do so, it is difficult to see how the relief would be adequate since Section 1.3 does not appear to contemplate anything other than a waiver or a *non-application* of the rule in question, whereas *affirmative* relief may be required. For example, the Commission recognizes that, with respect to its system of priorities among stations as to carriage and non-duplication, it may be necessary to "allow appropriate" relief upon the basis of a showing by one station that its signal should be afforded priority of treatment by the CATV system over the signals of another station which provides a calculated signal of equal or even higher grade (FCC 65-335, paras. 91(c) and 99, n. 55).

113. For such reasons, a procedure should be established by specific rule under which any party affected by the CATV rules could seek an exception or other appropriate special relief or treatment. We emphasize, however, that the procedures established for this purpose should require adequate notice to all interested parties, but should be

summary in nature and should be confined to written submissions by the parties concerned, except where the Commission concludes that more is required in any particular situation. Burdensome and time-consuming evidentiary hearings on these matters as a matter of course would not serve the public interest and, moreover, are not necessary in order to provide effective relief where relief is appropriate.

* * *

Excerpts from Comments of Midwest Television, Inc., submitted on July 26, 1965, to the Federal Communications Commission in "Part I" of the rule making proceeding in Docket Nos. 14895, 15233 and 15971:

* * *

4. By its actions of April 23, the Commission has taken a first major step forward in developing comprehensive regulations to deal with the CATV problem. With certain exceptions, noted herein, Midwest supports the Commission's actions. Contemporaneously with the filing of these Comments by Midwest, the Association of Maximum Service Telecasters (MST), of which Midwest stations WCIA and KFMB-TV are members, is filing comprehensive Comments in these proceedings. Midwest is familiar with MST's basic position on CATV and, except as otherwise noted herein, Midwest concurs in the views expressed and proposals made by MST in those Comments. Accordingly, these Comments will be confined to certain aspects of these matters.

* * *

15. The Commission has before it ample evidence to support its conclusion that the adverse effects of duplication of programming alone (irrespective of additional audience fragmentation which results from importation of multiple non-duplicating signals from distant stations) pose a real—*and growing*—threat to the continued health of local and area television broadcasting. However, the San Diego area survey referred to above provides additional and dramatic evidence of the effect of program duplication.

16. The San Diego area is presently served by three VHF stations which provide the area with the programs of all three networks.[1] CATV systems in operation there, however, none of which employs microwave, carry the signals of all seven commercial VHF Los Angeles stations. Non-duplication treatment is not afforded the local San Diego stations, but they are carried on the cable. Those local stations suffer a severe loss of audience when their programs are duplicated on the cable. During the prime evening hours of 7:30 to 11:00 P.M., when most of the programs broadcast by the three San Diego area stations were network programs, those stations accounted for between 88 per cent and 97 per cent of total viewing time of non-CATV subscribers surveyed in different areas. Among cable subscribers surveyed, the local stations' share of viewing time shrank to 62 per cent during the same period.

17. More detailed analysis tells the same story. Of those surveyed who were not CATV subscribers and who watched "Beverly Hillbillies" on June 23, 100 per cent saw it on the San Diego CBS affiliated station; of cable subscribers, only 69 per cent did. 96 per cent of non-subscribers who watched "Wednesday Night at the Movies" saw it on the San Diego NBC affiliated station; only 77 per cent of the cable subscribers did. During the hour from 9:00 to 10:00 P.M., Sunday through Wednesday, each program broadcast by each of the San Diego area stations were simultaneously broadcast—and carried on the cable—by a Los Angeles station. Among those interviewed who watched these duplicated programs, 93 per cent of non-subscribers saw them on the local stations, whereas only 77 per cent of cable subscribers did so.

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[1] Midwest's station KFMB-TV is a CBS affiliate. KOGO, San Diego, is an NBC affiliate. The third station, XETV, an ABC affiliate, is located in Tijuana, Mexico, just a few miles from San Diego.

2. The Critical Situation in San Diego.

40. Midwest's concern with the unrestrained proliferation of CATV is by no means confined to central Illinois. In Southern California, within the service area of Midwest's station KFMB-TV, San Diego, CATV has been growing at great speed. The first system in that area was franchised in March of 1963. Since then, seven additional systems have been franchised—one in September 1964 and two in just the last three months. All eight systems are within the Grade A contour of KFMB-TV, which falls within the metropolitan San Diego area; four of the systems are located in San Diego itself. System construction does not of course begin until sometime after grant of a franchise, and four of the eight San Diego area CATV systems are not yet operative (though two of the four are expected to begin operating momentarily). Figures as to the number of subscribers these systems have secured are not public and, although Midwest has tried to obtain current data, the information was not made available. As of February 1965, the number was roughly estimated at approximately 10,000 homes. However, the installation of new cable has been proceeding at a furious pace in recent months. Midwest engineering personnel recently counted drops in a part of San Diego where CATV had been available for only three months. Of 159 homes in that area, 58 were wired for CATV—and this is an area where all three local stations can be satisfactorily received. In the June 1965 survey made for Midwest in the San Diego area by an independent research organization,[1] 300 cable subscribers were interviewed; 43 per cent had been subscribers for less than three months.

41. Nor have the Commission's admonitions to local authorities to proceed with caution curbed this activity thus far. Only recently the San Diego County Supervisors approved a procedure for licensing CATV's in the unin-

[1] See footnote 2, p. 5, *supra*.

corporated areas of the county. (*Broadcasting*, July 5, 1965, p. 80).

42. The three local VHF stations which serve San Diego already face serious audience fragmentation as a result of the importation of both network-owned and independent stations from Los Angeles and face the threat of yet more severe effects in the immediate future as operating systems expand their operations and as CATV systems which are franchised but not yet operating commenced operations. All of this is true despite the fact that the stations are network affiliated, are well-established and have strong ownership and management, and despite the further fact that the San Diego market is a substantial one. Again, however, as in central Illinois, the most immediate effects will be upon the development of new UHF service. Construction permits are outstanding for two new commercial UHF stations to operate on Channels 39 and 51 in San Diego. Unless effective action is taken by the Commission, it is doubtful that either of these authorized UHF stations will go on the air or, if they do, that their operations will be viable.

43. There can be no doubt of the threat which this intensified activity poses to the development of UHF service in San Diego. The impact of rapidly expanding CATV on these *proposed* UHF stations can be clearly seen from the severe audience losses which the three *existing* VHF network affiliated stations face, as reflected in the June 1965 survey. Three hundred cable subscribers were asked, "Which channel do you now use most?" Only 49 per cent named a San Diego channel; fully 55 per cent named a Los Angeles channel.[1] The same question was put to two groups of non-CATV subscribers (150 in areas where there is CATV and 150 in areas where this is no CATV). San Diego stations were named by 108 per cent and 94 per cent,

[1] An additional 10 per cent made no choice. Percentages total to more than 100 per cent because some multiple answers were given.

respectively, while Los Angeles stations were named by only 5 per cent and 11 per cent. The survey also asked about stations used next most and third most frequently. The results are dramatic:

Per Cent of Respondents Who Named A San Diego Station As One of the Three Stations That Were Used Most

(Station Named)	Non-Subscribers	CATV Subscribers
KFMB-TV	90%	44%
KOGO	89%	48%
XETV	77%	29%

44. Perhaps even more striking, with respect to the impact on the proposed independent UHF San Diego stations, is the fact that 25 per cent of the 300 CATV subscribers interviewed named a Los Angeles *independent* station as the channel they used most; only 1 per cent and 2 per cent respectively, of the two groups of non-subscribers did so. Moreover, 56 per cent of the CATV subscribers (as compared with 11 per cent of non-subscribers) named at least one Los Angeles independent as one of the three stations used most.

45. Other statistical approaches likewise reveal that independents in communities like San Diego will have a rough go, at best. During the one-hour period from 5:00 to 6:00 in the afternoon, Monday through Friday, there was no duplication by Los Angeles stations of the programs broadcast in San Diego. In other words, all stations in both cities could be considered "independents" during that period, and a cable subscriber could watch any one of *ten* different programs. The audience lost to the Los Angeles stations was staggering. Among non-subscribers surveyed, 95 per cent of those who watched television during that hour watched one of the San Diego stations. Of cable subscribers, however, the three San Diego stations accounted for only 48 per cent of total viewing; the Los

Angeles stations accounted for 52 per cent—16 per cent for the network stations, 36 per cent for the independents. One Los Angeles station alone (an independent) accounted for 20 per cent, surpassing two of the three San Diego stations (which had 12 per cent and 11 per cent, respectively). Even during the 9-10 P.M. period on Sunday through Wednesday, when all San Diego programs were network programs duplicated by Los Angeles stations, the Los Angeles independents accounted for 16 per cent of viewing time. In short, the new independent UHF stations proposed for San Diego will, in homes that are or will be CATV subscribers, be attempting to enter a market where, at various times of the day, they will be attempting to compete for audience with ten other stations offering from seven to ten different programs to the public.

46. The foregoing brief sketch of CATV activity is only illustrative of what is increasingly confronting present and prospective local and area television broadcast stations in communities throughout the nation. When it is considered that this surge of CATV activity has, until recently, been without regulatory guidance or effective rules to protect the public interest in free, local and area television broadcast service, the need for immediate, effective regulatory action by the Commission becomes readily apparent. Nor have the Commission's actions of April 23, by themselves, significantly deterred this surge of CATV activity thus far. It is noteworthy that in central Illinois the proposals for CATV in Springfield, Peoria, Champaign and Urbana, among others in the area, *have all been announced since April 23.* Indeed, at least eight new CATV operators filed applications for local franchises in central Illinois *during the first two weeks of July.* In the San Diego area, the last few months have seen a flood of new CATV hook-ups. As already pointed out, the survey revealed that as of late June *43 per cent* of the cable subscribers interviewed had been subscribers *for less than three months* and Midwest engineering personnel counted 58 CATV homes in a

159-home area in San Diego where CATV had been available for only *three months.*

47. Moreover, it is essential that such interim action be made applicable to all CATV systems irrespective of whether they use microwave. The importance of extending interim rules to all CATV systems regardless of whether microwave facilities are used is indicated by the fact that of some 1,257 CATV reported to be operational in late 1964, only 273—less than one-fifth—utilized microwave facilities (Seiden, *An Economic Analysis of CATV Systems and The Television Broadcasting Industry,* p. 50, 1965). Even without the use of microwave, CATV systems can import distant signals from a considerable distance by using advantageous receiving sites, high towers, elaborate receiving antennas and elaborate amplification systems. San Diego is an example of a situation where importation of distant signals does not depend upon the use of microwave; the CATV systems now operating there do not rely upon microwave to import the signals of the Los Angeles stations.

* * *

C. A Proposed New Interim Rule.

52. Accordingly, Midwest proposes that the Commission, by interim rule, issue a general stay against *all* further CATV activity where the CATV carries or proposes to carry the signal of any station beyond its Grade B contour. While there should be such a general stay of all further CATV activity, Midwest believes it would be appropriate for the Commission to provide for an appropriate waiver of the stay in *limited* circumstances upon a special showing by the CATV system of public need for service. However, the Commission should *not consider* waiving such a stay except in those cases where the CATV system would serve a "white" area which is presently without any television service. In these cases the Commission should weigh the needs of the community against the

possibility that CATV operations might impair the development of any existing, authorized or applied for local television station—UHF or VHF, independent or network-affiliated, commercial or educational—in the area. It should further consider the likelihood of off-the-air service to the community in question by translators or other low-powered stations.

53. The issue involved here is *not* a matter of making a final, complete disposition with respect to CATV regulation. The issue here is what action is required in order to maintain the orderly growth and development of television broadcasting during the pendency of these proceedings. This is not a situation where television service to the public would be frozen. Quite the contrary, the swift and orderly growth of UHF television will continue vigorously—even more so than if the Commission were to allow CATV to continue to expand "willy nilly" without direction, order, or purpose.

54. The stay rule proposed should become effective immediately upon its publication. It should be made fully effective with respect to (a) all subsequent CATV proposals, (b) all CATV systems which have franchise applications pending, and (c) all CATV systems for which franchises have been granted but which are not in operation. Any CATV system which was in existence prior to April 23, 1965, but which has substantially expanded its lines or the number of its subscribers or has increased the number of stations carried since that date should be required to modify its operations to the extent necessary to bring it into conformance with the interim rule. The April 23, 1965, cut-off date is entirely appropriate because that is the date when the Commission issued its *Notice of Inquiry and Notice of Proposed Rule Making* in Docket No. 5971, where it "put all persons who now operate or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of

the nature indicated, whether microwave is used or not." (FCC 65-334, para. 65).

55. It is essential that the interim rule be made applicable to *existing* systems. The interim rule will be totally ineffective in many cities if non-conforming existing systems are allowed to continue to expand or extend their operations, string new cable, increase the number of subscribers, add outside stations, or in any other way expand their facilities or services. The continued expansion of non-conforming systems already constructed or operating can seriously damage existing local television operations, and could well foreclose the development of new UHF station operation forever. San Diego is an example of just such a situation. As previously mentioned, of the eight CATV systems in that area which are franchised, four are presently in operation and are rapidly expanding their lines and subscribers.

56. Some of the damage in San Diego and elsewhere had already been done by April 23. But further CATV expansion has been pursued with the greatest vigor since that date, and the damage increases in proportion. And this has occurred in the teeth of the Commission's clear announcement in the Notice. The Commission should make plain that it means what it said. To advert to a useful analogy, the Commission has explained that the congressional policy behind requiring permits to *construct* broadcast stations was "to discourage applicants [for operating licenses] from making large investments and using such investments as 'improper pressure' on the licensing authority." *WSAV, Inc.*, Docket Nos. 10517 and 10518, 10 R.R. 402, 403j (1955). In the circumstances, a rollback to the situation that existed on April 23, 1965, is singularly appropriate.

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